

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
WTVG, Inc.)	
)	CSR-7024-N
Petition For Waiver of Section 76.92(f))	
of the Commission's Rules)	

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 2010

Released: March 18, 2010

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. WTVG, Inc., licensee of television broadcast station WTVG (ABC), Toledo, Ohio ("WTVG"), filed the captioned petition seeking a waiver of the rules that preclude cable operators from deleting the duplicate programming of "significantly viewed" stations under the network nonduplication rules ("exclusivity rules").¹ Specifically, WTVG seeks a waiver of the significantly viewed exception so that it may enforce its exclusivity rights against station WXYZ-TV, Detroit, Michigan ("WXYZ-TV") in the city of Toledo, Ohio.² Oppositions to this petition were filed by Buckeye Cablevision, Inc. ("Buckeye"), operator of the cable systems serving Toledo, Ohio and WXYZ-TV, to which WTVG replied.³ For the reasons discussed below, we grant WTVG's waiver request.⁴

¹47 C.F.R. §76.92(f). Although not expressly requested in WTVG's petition for waiver of Section 76.92(f) (significantly viewed exception to cable network nonduplication), a waiver of Section 76.122(j) (significantly viewed exception to satellite network nonduplication) would also appertain to a waiver for carriage on DBS systems based on the same showing that a station is no longer significantly viewed in the relevant community. See 47 C.F.R. §§ 76.92(f), and 76.122(j). See 47 U.S.C. §§ 340(a)(2) and 340(c).

²Petition at 1.

³We note that WTVG subsequently filed a supplement to its request.

⁴We note that because Buckeye's technically-integrated cable system serves communities located in both the Toledo DMA and the Detroit DMA, the commercial television stations of both markets would be considered must carry stations. In *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2975-76 (1993) ("*Must Carry Order*"), the Commission stated that "in situations where a cable system serves a community or communities in more than one county and those counties are assigned to different [DMAs], the cable operator must carry all of the local commercial television signals in both [DMAs] (subject to the statutory safeguards provided for in the Act, *e.g.*, the limitations on one-third of usable channel capacity, the substantial duplication limitation, the closest network affiliation limitation, etc.), unless the cable operator can segregate their carriage on its systems. In this instance, Buckeye maintains it cannot

(continued...)

II. BACKGROUND

2. Upon the request of a local television station with exclusive rights to distribute a network or syndicated program, a cable operator generally may not carry a duplicating program broadcast by a distant station.⁵ Under Section 76.92(f) of the Commission's rules, however, a signal otherwise subject to deletion is exempt from application of the network nonduplication rules if it is "significantly viewed" in a relevant community (the "significantly viewed exception").⁶ The significantly viewed exception to the exclusivity rules is based on it being established that an otherwise distant station receives a "significant" level of over-the-air viewership in a subject community. If this viewership level is met, the station is no longer considered distant for purposes of the application of the exclusivity rules because it has established that it is viewed over the air in the subject community. A similar exception is provided in the syndicated exclusivity rules.⁷

3. In order to obtain a waiver of Section 76.92(f), the Commission held in *KCST-TV, Inc.*⁸ that petitioners would be required to demonstrate for two consecutive years that a station was no longer significantly viewed, based either on community-specific or system-specific over-the-air viewing data, following the methodology set forth in Section 76.54(b) of the Commission's rules. Section 76.5(i) requires that for network stations to be considered significantly viewed, the survey results should exceed a 3 percent share of total viewing hours and a net weekly circulation of 25 percent, by at least one standard error.⁹ For independent stations (*i.e.*, non-network stations), to be considered significantly viewed, Section 76.5(i) of the Commission's rules requires that the survey results should exceed a 2 percent share of total viewing hours and a net weekly circulation of 5 percent, by at least one standard error.¹⁰ The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.¹¹

4. Since the Commission's decision in *KCST-TV*, the methodology required by Section 76.54(b) of the rules for a petitioner seeking a waiver of the significantly viewed exception has evolved, pursuant to case law and market realities. Section 76.54(b) states in pertinent part that significant viewing "may be demonstrated by an independent professional audience survey of [over-the-air] television homes that covers at least two weekly periods separated by at least thirty (30) days but no more than one of which shall be a week between the months of April and September."¹² Over time, The Nielsen Company ("Nielsen") became the primary surveying organization through which a petitioner could

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separate its technically-integrated system. See 47 C.F.R. § 76.56.

⁵See 47 C.F.R. §§76.92 and 76.101.

⁶47 C.F.R. §§ 76.92(f); see 47 C.F.R. §§ 76.5(i) and 76.54.

⁷47 C.F.R. § 76.106(a).

⁸103 FCC 2d 407 (1986).

⁹47 C.F.R. §76.5(i).

¹⁰*Id.*

¹¹See *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

¹²47 C.F.R. § 76.54(b). The criteria set forth in *KCST-TV* require that two separate surveys be performed pursuant to Section 76.54(b) in consecutive years. The provisions of Section 76.54(b) therefore apply to each year's survey. It should be noted that these types of surveys cannot be done by the affected television station, cable system or satellite operator.

obtain television surveys.¹³ Nielsen, which routinely surveys television markets to obtain television stations' viewership, conducts four-week audience surveys four times a year (*i.e.*, February, May, July and November "sweep periods"). The Bureau has found that replacing each week required under *KCST-TV* with a sweep period is acceptable and, if anything, adds to the accuracy of the audience statistics because of the increased sample size.¹⁴ Accordingly, a petitioner may submit the results from two sweep periods in each year. For use in exclusivity waivers, a petitioner may purchase survey data from Nielsen on either a community-specific or system-specific basis.¹⁵ If a petitioner is purchasing survey data on a system-specific basis where two or more communities are involved, the percentage of diaries from each community surveyed must be approximately the same as the percentage of the total population for each community served by the cable system.¹⁶ In order to produce the data required for exclusivity waivers, Nielsen re-tabulates the data that it collects from over-the-air households for its routine audience sweep periods, selecting in-tab diaries from its database from the area served by a cable system or an individual cable community.¹⁷ It should be noted that, despite the fact that a petitioner is purchasing a re-tabulation of data that has already been collected, it is still obligated to notify interested parties prior to the purchase of such data, pursuant to the requirements set forth in Section 76.54(c) of the Commission's rules.¹⁸ Such notice should indicate the surveying organization, the methodology used to calculate the viewing shares (*e.g.*, a description of the process used to re-tabulate the information in an existing database), the manner in which the communities (and/or zip codes) were selected, and the survey periods used.¹⁹ Notification to interested parties before the purchase of Nielsen data allows a petitioner to correct any

¹³The Nielsen Company was previously known as Nielsen Media Research.

¹⁴Although, in general, petitioners are prohibited from using two surveys between April and September (*i.e.*, May or July sweeps), we have not ruled out a petitioner providing all sweeps in a year where more than two are submitted. See *WTNH Broadcasting, Inc. and K-W TV, Inc.*, 16 FCC Rcd 6781, 6784 (2001), where the Bureau did not reject the petition because of the inclusion of both May and July data, but only concluded that, in such a case, it would be necessary to provide individual survey period results so that we could determine the effect of the third and fourth sweep periods.

¹⁵It should be noted that Nielsen identifies individual communities by zip codes, a process not incompatible with the surveying process discussed here.

¹⁶47 C.F.R. § 76.54(b). Proportionality based on population demonstrates that more weight is given to larger communities. While there must be at least one diary from each community in each survey, there is no minimum sample size since the standard error allows us to be sure that there is a high probability that the reported result meets or falls below our criteria. Because Nielsen is able to weight its sampling, they can provide such proportionality.

¹⁷We expect petitioners who commission such data to include, along with the survey data itself, a description of the procedures used to re-tabulate the data, which data base it is using, what communities (or zip codes) are covered, the station(s) surveyed, and time periods covered. Because Nielsen routinely provides this information in a cover letter along with its survey data, it is most helpful if this letter is included. That way there is no doubt that the data provided was obtained from Nielsen. See *e.g.*, *Radio Perry, Inc.*, 11 FCC Rcd 10564, 10568-9 (1996); *Gulf-California Broadcast Company*, 21 FCC Rcd 3476, 3479-80 (2006). We further suggest that the petitioner make it clear that the data they are submitting, along with the description of methodology, are as agreed on between the petitioner and Nielsen.

¹⁸47 C.F.R. § 76.54(c). Section 76.54(c) states that "[n]otice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities at least (30) days prior to the initial survey period."

¹⁹*Id.*

errors or clarify issues related to the methodology before the data are purchased and the petition is actually filed and, perhaps, avoid the filing of oppositions. Finally, we note that the manner in which surveys based on sweep periods are averaged, remains the same as for weekly surveys.²⁰ A petitioner may therefore submit the average of the two sweep periods for each year. If, however, a petitioner submits more than two sweep periods, in addition to the average or combined audience shares for the year, it must also include the separate sweep data for each individual sweep period used. This ensures that the reported audience results data are not skewed by the choice of sweep periods.

5. WTVG seeks a waiver of the significantly viewed exception so that it may enforce its network nonduplication rights against station WXYZ-TV for the City of Toledo, Ohio.²¹ WXYZ-TV is considered to be significantly viewed in Lucas County, Ohio, where Toledo is located.²²

6. WTVG states that it is licensed to a community in the Toledo, Ohio designated market area (“DMA”), while WXYZ-TV is licensed to a community in the Detroit, Michigan DMA.²³ WTVG argues that it would normally be entitled to assert exclusivity protection against WXYZ-TV in Toledo, but it cannot because WXYZ-TV is considered significantly viewed in Lucas County, Ohio, where Toledo is located.²⁴ WTVG maintains, however, that WXYZ-TV no longer meets the significantly viewed standard in Toledo and, as proof, it submits the results of a special community-specific survey conducted by Nielsen.²⁵ WTVG states that Nielsen conducted a community-specific re-tabulation of audience data based on noncable/non-ADS homes for the specified zip codes comprising the community of Toledo.²⁶ The submitted data include the separate results from two four-week audience sweep periods in each of two years and average results for each of the two years. The first year’s survey audience estimates were based on May 2003 and February 2004 sweep periods, and the second year’s estimates on the May 2004 and February 2005 sweeps periods.²⁷ These survey dates and the method used to combine audience surveys are consistent with the requirements set forth in Section 76.54(b) of the Commission’s rules.²⁸ WTVG states that WXYZ-TV’s share of total viewing hours in over-the-air homes in Toledo falls far short of the required significantly viewed minimums, within one standard error, as shown in the table below:

²⁰Section 76.54(b) states that “[i]f two surveys are taken, they shall include samples sufficient to assure that the combined surveys result in an average figure at least one standard error above the required viewing levels. If surveys are taken for more than 2-weekly periods in any 12 months, all such surveys must result in an average figure at least one standard error above the required viewing level.”

²¹Petition at 1.

²²*Id.* at 2.

²³*Id.*

²⁴*Id.* WTVG states that WXYZ-TV achieved their significantly viewed status by their inclusion in Appendix B to the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 378 (1972).

²⁵*Id.* at Exhibits 1 and 2.

²⁶*Id.* Nielsen defines Alternative Delivery Source (“ADS”) to include the following technologies: satellite (C-Band), DBS (Ku-Band), SMATV (master antennae), and MMDS (includes multi-channel multi-point and multi-point distribution service). Thus, noncable/non-ADS homes are those that do not subscribe to an MVPD, and view the broadcast signal in question off-air. See Nielsen Company at <http://www.nielsenmedia.com/glossary/>.

²⁷*Id.*

²⁸47 C.F.R. § 76.54(b).

TABLE 1 – WXYZ-TV VIEWING IN TOLEDO²⁹

<u>Survey Year</u> ³⁰	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
May 2003/ Feb. 2004	72	0.05	0.05	0.63	0.65
May 2004/ Feb. 2005	75	0.03	0.02	2.26	1.60

As a result, WTVG requests that the Commission grant its petition so that it can assert its exclusivity rights in Toledo, Ohio.

7. In its opposition, WXYZ-TV argues that WTVG’s significant viewing study was not commissioned in accordance with the Commission’s procedural rules and the data raises questions as to the study’s reliability.³¹ WXYZ-TV states that the Commission’s rules mandate that notice of a proposed audience survey shall be served on those parties that would be affected by a change in the significantly viewed status of the broadcast station surveyed at least 30 days prior to the initial survey period.³² WXYZ-TV states that it is not aware of having received such notice.³³ WXYZ-TV argues that failure to provide the required notice not only prevents any interested parties from objecting to the survey procedures, but also renders a petition for special relief based on such a survey necessarily flawed and should require the dismissal of such a petition.³⁴ Even if considered, however, WXYZ-TV maintains that the viewership study submitted by WTVG contains numerous errors. First, the study states that it addresses viewership in “Flint, Michigan” rather than Toledo, Ohio, which calls into question whether the data provided actually refers to Toledo, particularly as WTVG previously filed a similar petition for WJRT-TV, a station licensed to Flint, Michigan.³⁵ WXYZ-TV argues that the possibility of such confusion is reinforced by the fact that, just like the WJRT-TV study, the data provided by WTVG is “anomalous” in that it shows measurable audience for WXYZ-TV during the two May sweeps periods, but not during the two February sweeps periods, even though Nielsen reported in-tab diaries for those periods.³⁶ Second, WXYZ-TV notes that WTVG does not include data from 13 of the 34 zip codes

²⁹It should be noted that these results were submitted in WTVG’s reply, with the separate sweep averages supplied in its initial petition.

³⁰The survey dates of May 2003 and February 2004 and May 2004 and February 2005 meet the criteria set forth in the rules and *KCST-TV* that the two one-week surveys be separated by at least 30 days and that both surveys may not occur between April and September.

³¹WXYZ-TV Opposition at 2.

³²*Id.*, citing 47 C.F.R. § 76.54(c); *see also Delmarva Broadcast Service General Partnership*, 14 FCC Rcd 10509 (1999).

³³*Id.* at 3.

³⁴*Id.*

³⁵*Id.*, citing *Flint License Subsidiary Corp.*, 21 FCC Rcd 653 (2006).

³⁶*Id.*

assigned to Toledo nor does it provide an explanation for this omission.³⁷ Third, WTVG failed to account for the fact that the penetration rate of the cable system in Toledo is so high that a survey of over-the-air households cannot be relied upon as reflective of community viewing patterns.³⁸ WXYZ-TV states that the impact of high cable penetration has been recognized as a factor that may impact the determination of significantly viewed status and is a potential concern of the Commission in evaluating off-air viewing data.³⁹ In this instance, WXYZ-TV states that, according to Nielsen, the zip codes for which it provided data account for only 15.4 percent of the homes that receive WXYZ-TV's signal over the air.⁴⁰ The Commission has stated that a petitioner seeking waiver of network nonduplication rules "faces a high hurdle even at the starting gate."⁴¹ WXYZ-TV asserts that WTVG has not met this burden. Finally, WXYZ-TV argues that if WTVG's petition is granted, Buckeye will likely delete WXYZ-TV entirely from its line-up, not only in Toledo, but in the rest of Lucas County.⁴² This would discontinue service that residents in the county have received for nearly 40 years and would not be in the public interest.

8. Buckeye argues in opposition that if WTVG's petition is granted, it would be required to delete some of WXYZ-TV's broadcasts, and this would be technically and financially infeasible for only the City of Toledo portion of Buckeye's integrated, metropolitan Toledo cable system.⁴³ In any event, Buckeye maintains that WTVG has failed to satisfy the standard required for a waiver of Section 76.92(f) of the Commission's rules by failing to demonstrate that WXYZ-TV has not been significantly viewed for two consecutive years using community-specific or system-specific data covering each of the communities served by Buckeye's cable system.⁴⁴ Moreover, Buckeye contends that WTVG has not even attempted to demonstrate that it will suffer any economic harm absent a grant of the waiver, that there are any special circumstances that would warrant a deviation from the Commission's established rules or show how a waiver would serve the public interest.⁴⁵ Buckeye asserts that WTVG fails to provide any meaningful explanation of the survey's methodology and procedures or that the survey data is statistically reliable.⁴⁶ Buckeye states that in *Radio Perry, Inc.*, the Bureau held that a "[p]etitioner's failure to provide a sufficient explanation of the submitted data requires that [the Bureau] deny its request for waiver of the rules."⁴⁷ Buckeye states that the only explanation WTVG provides is a short, vague, and conclusory cover letter from Nielsen which fails to provide the meaningful explanation of the

³⁷*Id.*, citing Petition at Exhibit 1.

³⁸*Id.* at 4.

³⁹*Id.*, citing *KCST-TV v. FCC*, 699 F.2d 1185, 1199 (D.C. Cir. 1983) (Scalia, J. dissenting); *KCST-TV*, 103 2d at 412.

⁴⁰*Id.*, citing Petition at Exhibit 2.

⁴¹*Id.*, citing *KCST-TV*, 103 FCC 2d at 412 (citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

⁴²*Id.*

⁴³Buckeye Opposition at 2.

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶*Id.* at 6.

⁴⁷*Id.*, citing 11 FCC Rcd 10564, 10568 (1996). Buckeye notes that the Bureau recently reiterated this requirement in *Gulf California Broadcasting Company*, 21 FCC Rcd 3476, 3479 (2006) (citing *Barrington Broadcasting Corporation*, 19 FCC Rcd 22046 (2004) and 47 C.F.R. § 76.54(c)).

survey's methodology and procedures that the Commission's precedents require.⁴⁸ Specifically, WTVG fails to provide: a) an explanation of how its survey data was derived; b) information regarding how the re-tabulation of Nielsen's routine sweeps diaries was performed; c) details of the steps taken to ensure that the data adequately represented noncable households; d) an explanation of how it converted DMA-wide or county-wide data to community-specific data; e) an explanation of how it calculated a standard error to account for re-tabulation of the Nielsen data; f) substantiation that the Nielsen surveys selected represent the over-the-air viewing habits of households in the cable community; and g) proof that such samples are statistically reliable, particularly given the small number of samples reported for each survey period.⁴⁹

9. Buckeye argues that WTVG's survey should also be rejected because it fails to correctly calculate the standard error it used to estimate WXYZ-TV's over-the-air audience share in the Toledo portion of Buckeye's cable system.⁵⁰ According to Buckeye, the Nielsen survey provided confirms that WTVG used an arithmetic average of standard errors Nielsen apparently calculated (but failed to explain) for each of the sweeps periods included in the survey.⁵¹ Buckeye states that the Bureau has specifically rejected this type of methodology.⁵² Further, Buckeye maintains that WTVG's survey fails to explain or justify its use of certain Toledo zip codes.⁵³ Buckeye argues that nothing in the petition or survey explains how the zip codes were selected, whether all the residential zip codes in Toledo were included in the survey, whether some or all of the zip codes included in the survey overlap areas both within and without the City of Toledo (and if so, by what proportion), and whether the distribution of diaries among the purported Toledo zip codes is even roughly proportional to the population of those areas.⁵⁴ Buckeye states that U.S. Postal Service ("USPS") data and the 2000 Census confirm that two of the zip codes purportedly reflected in the survey are "unique" zip codes for which there is no population or occupied households.⁵⁵ In addition, Buckeye states that the 2000 Census also confirms that the number of occupied households located in the zip codes included in WTVG's survey range from 0 to 17,393 (zip code 43615) and that some of those occupied households are located outside the City of Toledo.⁵⁶ Buckeye argues that neither WTVG nor Nielsen provides an explanation of how many diaries come from each of the zip codes or how many diaries come from areas of those zip codes located outside Toledo.⁵⁷ Indeed, the 2000 Census reports 128,925 occupied households in the City of Toledo, but there

⁴⁸*Id.* at 7-8.

⁴⁹*Id.* at 8.

⁵⁰*Id.*

⁵¹*Id.*, citing Petition at 5 and Exhibit 2.

⁵²*Id.* at 8-9, citing *Gulf California*, 21 FCC Rcd at 3480.

⁵³*Id.* at 9. Buckeye states that WTVG indicates that the survey results are for the following zip codes: 43602, 43604, 43605, 43607, 43608, 43610, 43611, 43612, 43613, 43614, 43615, 43617, 43620, 43623, 43624, 43659, and 43660. See Petition at 4.

⁵⁴*Id.* at 10.

⁵⁵*Id.* at Exhibit 2. Buckeye notes that USPS identifies zip code 43659 as a "unique" zip code for Owens Corning, and zip code 43660 as a "unique" zip code for the Toledo Blade. The 2000 Census confirms that there is no population or occupied households for either zip code.

⁵⁶*Id.* at 11.

⁵⁷*Id.*

are 140,582 occupied households for the zip codes included in the petition.⁵⁸ Thus, Buckeye argues, WTVG's survey fails to represent a statistically reliable sample for the City of Toledo.

10. Buckeye argues further that WTVG's petition should be denied because the survey fails to include all the communities served by Buckeye's cable system.⁵⁹ Although the Commission's rules allow petitioners to elect between performing a single, system-specific survey or a number of individual community-specific surveys for the various communities served by a cable system, Buckeye maintains that WTVG should not be permitted to "cherry-pick" a single community from a technically-integrated cable system that is incapable of selectively deleting WXYZ-TV's network programming in only one community.⁶⁰ Buckeye states that the Commission's rules require that where a single survey is used in a cable system that serves more than one community (a system-specific survey), the sample must include noncable television households in each cable community that are proportional to the population.⁶¹ Community-specific surveys, however, do not require this proportionality if performed independently.⁶² Buckeye argues that the Commission expects petitioners to include a "community-based viewership survey, taken on the basis of the entire cable system" as opposed to submitting a community-specific survey for only one of many cable communities served by a system where a station is significantly viewed.⁶³ In this case, WTVG purportedly includes only households in the City of Toledo, despite the fact that Buckeye's cable system also serves 14 other Lucas County, Ohio communities and 6 communities in Lenawee and Monroe Counties, Michigan, where WXYZ-TV is significantly viewed.⁶⁴ Given the commercial impracticability and economic cost of deleting WXYZ-TV in a single franchise area, out of the 26 franchise areas it serves, Buckeye asserts that WTVG should be required to address its petition to all of the Buckeye cable communities where the Commission has determined that WXYZ-TV is significantly viewed.⁶⁵

11. Finally, Buckeye raises the same arguments as WXYZ-TV with regard to WTVG's failure to demonstrate that it has suffered economic hardship due to the presence of WXYZ-TV on Buckeye's cable system and that WTVG failed to comply with the Commission's procedural requirements with regard to its notice of intent to perform a survey, as required by Section 76.54(c) of the Commission's rules.⁶⁶

12. In its reply, WTVG argues that WXYZ-TV and Buckeye's oppositions are based on an incorrect understanding and application of the Commission's standard regarding the showing required to establish that a particular station is no longer significantly viewed in a specific community.⁶⁷ Although

⁵⁸*Id.*

⁵⁹*Id.*

⁶⁰*Id.* at 11-12.

⁶¹*Id.* at 12, citing 47 C.F.R. § 76.54(b).

⁶²*Id.*

⁶³*Id.*

⁶⁴*Id.* at 12-13 n.34. Buckeye states that WXYZ-TV is also carried on the portion of its system located in Wood County, Ohio.

⁶⁵*Id.* at 13 and 16-19.

⁶⁶*Id.* at 13-15.

⁶⁷Reply at 2.

Buckeye argues that WTVG did not satisfy the general waiver standards, WTVG points out that waivers of the significantly viewed exception apply the standards set forth in *KCST-TV* and do not require a showing of economic harm or special circumstances.⁶⁸ Moreover, WTVG argues that its survey fully complies with the standards set forth in *KCST-TV*.⁶⁹ WTVG states that it included a signed letter from Nielsen describing not only its methodology and procedures but a statement that the survey includes only noncable/non-ADS households.⁷⁰ WTVG states that this explanation is completely consistent with those previously accepted by the Commission.⁷¹ Further, WTVG argues that Buckeye has no basis to assert that it converted DMA-wide or county-wide data to community-specific data because it purchased only community-specific data from Nielsen, providing Nielsen a list of community-specific zip codes upon which it based its survey.⁷² WTVG asserts that this survey is statistically reliable and includes the required standard error, which has been repeatedly recognized as providing “the means to assess the accuracy of any sample, regardless of size.”⁷³ Moreover, WTVG states that the sample size used in the survey (between 32-43 households) exceeds that used in other similar situations.⁷⁴ While WTVG does admit that it inadvertently included an arithmetic average in its original submission, it supplemented its Petition with the correct standard error provided from Nielsen.⁷⁵

13. With regard to WXYZ-TV’s contention that the survey is flawed because it presents “anomalous” results, WTVG argues that the Commission allows parties to select any two survey periods within a consecutive two-year period, regardless of what other survey periods might show.⁷⁶ In this instance, WTVG states that it selected May 2003, February 2004, May 2004 and February 2005 measurement periods because a greater number of diaries was available from them.⁷⁷ The survey, which includes one standard error to ensure reliable results, shows no measurable results for the February periods. WTVG points out that, despite WXYZ-TV’s wishes, neither WTVG nor Nielsen can modify the results of a statistically reliable survey to show measurable viewership when it does not exist.⁷⁸ In addition, WTVG maintains that its method of selecting zip codes complies with Commission precedent.⁷⁹ Indeed, WTVG states that it selected the zip codes to be used by Nielsen based on information provided

⁶⁸*Id.* at 3-4, citing *KCST-TV, Inc.*, 11 FCC 2d 407 at para. 11 (1986).

⁶⁹*Id.* at 4.

⁷⁰*Id.* at 5-6.

⁷¹*Id.* at 6, citing *Barrington Broadcasting Corporation’s* Petition for Special Relief (CSR-6342-N) at Exhibit 1.

⁷²*Id.* at 7.

⁷³*Id.* at 8, citing *Radio Perry*, 11 FCC Rcd at para. 11; *Delmarva Broadcast Service General Partnership*, 14 FCC Rcd 10509 at para. 12.

⁷⁴*Id.*, citing *WTNH Broadcasting, Inc.*, 16 FCC Rcd 6781 (2001); *Gray Mid-America TV License Corp.*, 18 FCC Rcd 295 (2003); *WSMH License LLC*, 20 FCC Rcd 14460 (2005); *Barrington Broadcasting Flint Corporation*, 19 FCC Rcd 22046 (2004).

⁷⁵*Id.* at Exhibit 3.

⁷⁶*Id.* at 9.

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹*Id.*

to WTVG directly from Buckeye.⁸⁰ Moreover, WTVG argues that because Nielsen's study includes only residential households, the inclusion of two "unique" zip codes has no effect on the overall survey.⁸¹ WTVG argues further that the Commission's rules permit a petitioner to use a community-specific survey for a single community, regardless as to whether it is part of a larger system.⁸² WTVG states that the fact that Buckeye operates a technically-integrated system is irrelevant in determining whether a particular station continues to be significantly viewed in a particular community and the Commission has rejected previous arguments to that effect.⁸³ In any event, WTVG argues that Buckeye has not provided sufficient information to demonstrate that it cannot selectively delete WXYZ-TV network programming nor has it provided an adequate explanation as to why it cannot effectuate such deletion at a lower cost than proposed.⁸⁴

14. Finally, WTVG argues that its petition satisfies the Commission's procedural requirements.⁸⁵ WTVG states that Section 76.54(c) of the rules requires an entity seeking relief from the significantly viewed exception to provide advance notice of a survey that has been commissioned specifically to demonstrate that a particular station is or is not significantly viewed.⁸⁶ WTVG argues that where, as in the instant case, an entity purchases re-tabulated data from Nielsen years after the data was originally collected, notice in advance of the initial survey is simply not possible.⁸⁷ In any event, WTVG states, neither Buckeye nor WXYZ-TV were prejudiced by any failure to provide notice, if such was required, as both had the opportunity to challenge the instant petition and have done so.

III. DISCUSSION

15. The apparent reason for WTVG's waiver request before us is to allow it to assert its network nonduplication rights against Buckeye's concurrent carriage of WXYZ-TV's network programming in Toledo, Ohio. We find that WTVG made the requisite showing to support its petition. As required by the rules, WTVG has provided community-specific survey results for WXYZ-TV for each year surveyed.⁸⁸ For the first year, the results show that WXYZ-TV attained a 0.10 percent share of total viewing hours (0.05 reported share + 0.05 standard error) and a 1.49 percent net weekly circulation share (0.74 reported share + 0.75 standard error). For the second year, the results indicate that WXYZ-TV attained a 0.05 percent share of total viewing hours (0.03 reported share + 0.02 standard error) and a 3.99 percent net weekly circulation share (2.33 reported share + 1.68 standard error). Accordingly, each of the reported audience statistics, plus one standard error, is below the criteria for a network station set forth in Section 76.5(i) of the rules (*i.e.*, 3 percent share of total weekly viewing hours and a 25 percent

⁸⁰*Id.* at Exhibits 4 and 5.

⁸¹*Id.* at 10. WTVG states that if it were to request Nielsen to re-tabulate data for the same survey periods excluding these two zip codes, the results would be virtually the same.

⁸²*Id.* at 12. WTVG states that what Buckeye is suggesting would require an adjudicatory proceeding to change the Commission's long-standing rules regarding the types of surveys permissible.

⁸³*Id.* at 12-13, citing *WTNH License, Inc.*, 16 FCC Rcd at 6784; *Grapevine of Austin License Sub, LLC*, 15 FCC Rcd 7349 (2000).

⁸⁴*Id.* at 14.

⁸⁵*Id.* at 17.

⁸⁶*Id.* at 18, citing 47 C.F.R. § 76.54(c).

⁸⁷*Id.*

⁸⁸*See* Table 1, *supra*.

net weekly circulation share).⁸⁹ As a result, we find that the data demonstrates that WXYZ-TV is no longer significantly viewed with respect to the community of Toledo, Ohio.

16. Initially, with respect to the procedural issues raised by WXYZ-TV and Buckeye, we find no fatal errors. Despite WTVG's assertion, Section 76.54(c) of the rules does apply, regardless of the type of survey data requested. Notification to interested parties before the purchase of Nielsen data would allow a petitioner to correct any errors or clarify issues related to the methodology before a petition is actually filed and, perhaps, avoid the filing of oppositions. However, we do not find that failure to comply with this requirement would automatically result in a denial of the petition. WTVG properly served its petition on the requested parties, pursuant to Section 76.7(a)(3) of the rules and this, combined with the Commission's public notice, ensured that the appropriate parties were notified.⁹⁰ Moreover, while both WXYZ-TV and Buckeye maintain that WTVG did not meet the waiver standards of Section 76.92(f) because it failed to demonstrate that it will suffer any economic harm absent the requested waiver, it should be noted that in *Report and Order in Gen. Docket No. 87-24*, the Commission eliminated its policy of granting waivers of the nonduplication rules based upon a showing of no significant harm to the local broadcaster.⁹¹ Accordingly, it is not a requirement for demonstrating that a waiver should be granted.

17. WXYZ-TV and Buckeye have raised numerous arguments in this proceeding ranging from survey methodology to technical and economic issues.⁹² We will take them in turn. First, we reject Buckeye's assertion that WTVG failed to provide a substantive explanation of its survey methodology. The survey data submitted by WTVG contains a cover letter from Nielsen which provides a description of its methodology. Specifically, this letter explained how Nielsen selected the households in its Nielsen Station Index database using the zip codes provided by the petitioner; detailed its weighting procedures and its methodology for calculating the standard errors for each estimate. The format and descriptions contained in Nielsen's letter are consistent with the Commission's well-established precedent for such submissions. Moreover, in its reply, WTVG provides additional extensive information regarding Nielsen's methodology, well beyond what is required. Second, we reject the arguments raised by WXYZ-TV and Buckeye regarding the zip codes used in the survey. While Nielsen's letter does not specifically list the zip codes used for the re-tabulation of the existing data, they are provided in the petition and again along with the reported audience survey results in the exhibit. Moreover, we note that WTVG obtained its list of service area zip codes directly from Buckeye and apparently used those located within Toledo. While Buckeye raised arguments with regard to the particular zip codes used in Nielsen's survey, it does not provide an alternative list of zip codes for the City of Toledo. In any event, we would not expect that every zip code in a community would have in-tab diaries and we have no requirement that the sample include in-tab diaries from each zip code. Thus, the listing of a zip code that is unique to a business in the request to Nielsen has no effect on the survey as one would expect that no in-tab diaries would come from that particular zip code. Moreover, in light of the small viewing shares and associated standard errors, it is unlikely that the inclusion or exclusion of a few additional zip codes

⁸⁹47 C.F.R. § 76.5(i).

⁹⁰*See Pappas Television, Inc.*, 51 FCC 2d 745 (1975); *Fresno Cable TV*, 48 FCC 2d 116 (1977).

⁹¹*See* 3 FCC Rcd 5299, 5320 (1988), *aff'd in part and modified in part*, 4 FCC Rcd 2711 (1989), *aff'd sub nom. United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989).

⁹²While Buckeye questioned WTVG's viewership data because it referenced Flint, Michigan, rather than Toledo, Ohio, we note that WTVG argued in reply that this was merely a typographical error. Indeed, upon review, we find that the correct identification of Toledo was provided on page 2 of the petition.

would measurably affect the statistical results. Third, we also reject Buckeye's argument that WTVG's survey is flawed because it surveyed only one of the communities served by its technically-integrated cable system. WTVG's decision to demonstrate that WXYZ-TV is no longer significantly viewed only in the City of Toledo is consistent with Commission precedent and the procedures established in the Commission's rules and *KCST-TV*.

18. Fourth, with regard to the audience data, we note that, in its reply, WTVG corrected its initial error in submitting the arithmetic average of two sweep periods in each year and we accept that correction. The survey periods used conform to the requirement that the two survey periods come from a one-year time frame, but in this case the sweeps used are not consecutive. However, since WTVG has also provided individual sweep period results, which are within the demonstrated audience levels within the same relative range, it does not appear that the selection was made to achieve a desired result and the assertion that the choice was based on maximizing the number of in-tab households appears legitimate.⁹³ Despite WXYZ-TV's contention that the survey's results are "anomalous," the May results that show some audience are not substantially different from the February results that are below Nielsen's reporting criteria. Thus, we reject this contention. Fifth, while WXYZ-TV claims that the cable penetration rate is so high that a survey of noncable homes would not reflect community viewing patterns, a showing of significant viewing is a measure of off-air viewing not general viewing patterns in a community. Moreover, the use of the standard error takes into account the sample size, which is often small with high cable penetration, although in this case the sample sizes ranged from 32 to 43 depending on the survey period. Again, this argument is rejected.

19. Buckeye claims that it will be technically infeasible for it to black out the network programming for WXYZ-TV only in the Toledo portion of its technically-integrated system.⁹⁴ After evaluating Buckeye's cost analysis, however, we are unable to determine the reasonableness of the costs that Buckeye would incur. In its request for waiver, Buckeye has merely introduced a laundry list of costs. It has provided no information about per subscriber costs and what impact such costs would have on its system's ability to serve its subscribers. Moreover, Buckeye's representations lack sufficient specificity to determine if the projected costs have been arrived through sound engineering practices. In this regard, Buckeye has provided no information to allow us to evaluate its engineering analysis. Without specific information regarding how Buckeye's system distributes its programming, such as subscribers per node, or the layout of its network relative to the affected areas, we are unable to determine if the costs to reconfigure its system, absent a waiver, are unreasonable. Further, Buckeye has provided no alternatives to their stated method such as the use of frequency traps, the reassignment of subscribers from one node to another, the deployment of addressable set-top boxes, or other methods which might be employed. In sum, we simply lack sufficient data to evaluate Buckeye's cost analysis. Lastly, we note that large, integrated systems like Buckeye's, by their very nature, have a large footprint which will be subject to various nonduplication obligations as a result of their chosen distribution architecture.

20. Accordingly, we find that the submitted audience surveys are sufficient to show that

⁹³See *WTNH Broadcasting*, 16 FCC Rcd at 6784 ("Petitioners are required to provide the results of two one-week surveys in each of two years to demonstrate that a waiver is justified. Given Nielsen's routine sampling procedures and their method for placing diaries for a four-week sweeps period, we find it reasonable that the results of two sweeps periods in each of two years be provided to make the required showing instead of merely the minimum two one-week surveys."). The individual sweep results here serve the same purpose to ensure that the choice was not "cherry-picking" in order to get a desired result.

⁹⁴See *supra* n.4.

WXYZ-TV no longer attains the viewing levels needed to demonstrate significantly viewed status in the City of Toledo, Ohio, and we grant WTVG's request.

IV. ORDERING CLAUSES

21. Accordingly, **IT IS ORDERED**, that the petition filed by WTVG, Inc. **IS GRANTED**.

22. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.⁹⁵

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

⁹⁵47 C.F.R. §0.283.